

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1484

Docket No. 77-1484

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-against-

ARNOLD NELSON MAHLER and DEAN H. UBBEN,

Defendants-Appellants

BRIEF FOR DEFENDANT-APPELLANT DEAN H. UBBEN

Appeal from the United States
District Court for the Southern
District of New York

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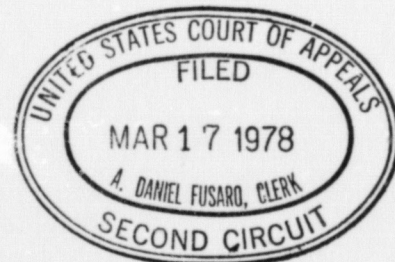


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. Defendants-Appellants.

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BRIEF FOR DEFENDANT-APPELLANT DEAN H. UBBEN

Defendant-Appellant Dean Ubben appeals from a judgment entered on December 8, 1977, by the United States District Court for the Southern District of New York after a nine-day trial before the Honorable Milton Pollack, U.S.D.J., and a jury, adjudging him guilty of one count of conspiracy in violation of 18 U.S.C. Sec. 371 and twelve substantive counts of mail and stock fraud in violation of 18 U.S.C. Secs. 1341, 1343 and 2, 15 U.S.C. Sec. 77 c(a) and 77 x. His sentence was eight years. Ubben's co-defendant, Arnold Mahler, was adjudged guilty of the same charges and sentenced to twelve years.*

This was the second trial for both defendants. The first, before the Honorable Marvin E. Frankel in April and

* As used in this Brief "A" signifies the Appendix. Numbered references without more are to the transcript of trial.

May of 1977, ended in a mistrial as to them and three other co-defendants - Jarrold R. Bachmann, John Hughes, and Billy Lovejoy - following a juror's hospitalization during deliberations. The jury, however, had already reported acquittals of three co-defendants - Lawrence Bialek, Marvin Greenberg, and Billy Joe Knight. Before the second trial, Bachmann, Hughes, and Lovejoy entered guilty pleas.*

QUESTIONS PRESENTED

1. Whether the District Court erred in retaining the alternate juror after the regular jurors began to deliberate, violating F.R.Crim.P. 24(c).
2. Whether the District Court's ruling improperly favored the Government, including through its charge, its intervention in the questioning of witnesses, and its restrictions of defendant's cross examination of the Government's expert.
3. Whether defendant's eight year sentence was disparate and excessive.

STATEMENT OF THE CASE

We do not contend that the government's case in this complex stock fraud trial was legally insufficient. Both defendants did testify, however, and Dean Ubben's claims and defenses if believed by the jury would have resulted

* Judge Pollack sentenced Lovejoy to three years in prison, Hughes to three months, and Bachmann to a \$500 fine. Earlier, Judge Frankel sentenced two other defendants who pleaded guilty to four months (Rind) and a \$500 fine (Dutzar).

in his acquittal of all charges. Mahler also would have been acquitted of all charges had his testimony been credited. Rather than a detailed analysis of the case, we submit a broad stroke explanation of each side's version to put in context the specific points raised on appeal.

A. A Summary of the Government's Case

International Industries, Inc. was a small machine job shop in Littleton, Colorado, operated and controlled by Billy Lovejoy, an engineer, and his brother Kent. In July, 1971 Billy Lovejoy acquired the rights to produce and distribute Mason Morgan's patented pneumatic pump ("the pump"), a device which through mechanical and air power transported materials that other pneumatic conveyers would reject. Whatever may have been the value of the pump, International Industries, Inc. was not in the position to produce or market it on any wide scale basis because the company was financially destitute and heavily in debt.

In the summer of 1972 Dean Ubben, who came from Nebraska, learned of the pump and was retained by Billy Lovejoy to seek funds. Ubben recommended a Rule 133*

* Former Rule 133 (17 C.F.R. Sec. 250.133) which was repealed effective December 31, 1972, adopted the so-called no-sale theory in the case of one company's acquisition of another company in exchange for its securities. If various conditions were met no registration was required to accomplish the merger. After the merger, the ordinary shareholder who acquired his shares in the open market was free to resell the shares acquired in the Rule 133 transaction in reliance on the Section 4(1) exemption. Shareholders who were controlling persons before the merger but not in control of the surviving corporation could sell such shares in normal brokerage transactions and in limited amounts.

merger of the company with a public shell and financing through the private placement of restricted stock. Billy Lovejoy agreed to this proposal after turning down a substantial offer from a large company - Power Regulator - to buy out his rights in the pump.

Dean Ubben then entered into negotiations with Arnold Mahler, Ted Zucker, and their attorney, Harold Herman, all based in New York, to acquire a public shell and have this New York group perform all the necessary mechanics to bring about the Rule 133 merger.*

Mahler and Zucker gained control of Bell-Ko Film Corporation, a public shell. Bell-Ko had 664,000 shares outstanding of which 200,000 were free and tradeable because of a prior Regulation A offering. Mahler gave Ubben 166,000 of the approximately 400,000 shares he and Zucker acquired.

Billy Lovejoy for his part then created a new corporation, Industries International, Inc. out of his old company and increased the number of outstanding shares to four millior. Billy Lovejoy gave Ubben one million of the shares.

Industries International ("Industries") proposed to acquire the assets of Bell-Ko, consisting of \$84 cash, for 664,000 Industries shares. Bell-Ko shareholders could then

* Dean Ubben had previously employed the services of the New York group in another shell deal ("Hup"), introduced by the government as a prior similar act. "U.G.B.I.," another corporate merger contended by the government to be nothing more than a "conglomerate" of worthless private companies, was also introduced as a prior similar act against Ubben.

acquire the shares of Industries on a one share for one share basis.

According to the government, the following, if believed, was part of the fraudulent scheme:

1. The proxy statement which asked the Bell-Ko shareholders to approve the Industries offer at a meeting to be held December 18, 1972, omitted the roles of Ubben, Mahler, and Zucker in the merger, their control of the Bell-Ko insider shares, Ubben's control of more than 20 percent of Industries, and that brokers would be bribed to make a market in Industries stock by listing the company in the "pink sheets" (p.p. 5-6 infra) (106, 115-21, 286, 704, 792).

2. The unaudited financial statements included in the proxy grossly inflated the value of Industries and the sales forecasts, also included in the proxy, were ridiculously exaggerated. Denver C.P.A. Lawrence Bialek, who prepared the unaudited financials and those in Hup and the certified accounting statements in U.G.B.I. (p. 4, supra), was in Ubben's hip pocket and had been called on by Ubben to use certain figures in the balance sheet after a large and reputable accounting firm, Fox & Co., declined to do so (508-13, 632). We note, however, that the government did not contend that Ubben played a role in the preparation of the sales forecasts. In fact they were the combined product of Tote Company, a division of Hoover Ball

Bearing, which had entered into an exclusive marketing agreement with Industries in November, 1972 and Jim Fortuin, who with David Norblom, also Industries' chief financial officer, owned Bronco Equipment, a company that did business with Industries (1513-14).

3. The board of directors of Industries never formally met to vote on the Industries offer to acquire Bell-Ko, which was approved by Bell-Ko shareholders on December 18, 1972, with the merger then taking effect. In fact, Harold Herman simply prepared a set of minutes which falsely stated that the Industries board had met on November 2, 1972, and approved the offer to the Bell-Ko shareholders (370-71). Later, in January, 1973 the directors of Industries executed back-dated waivers of notice for the non occurring meeting. We note that Dean Ubben was not a member of the Industries Board and did not participate in the back-dating.

4. In late 1972 and early 1973, it was arranged to have Industries stock traded on the over-the-counter market by bribing William Wellens, a stockbroker with P.J. Stanton & Co., to list his company's name in the pink sheets as available to buy and sell the stock. Initially, Mahler and Zucker approached Louis Kulekofsky, a stock promoter, and promised him one thousand dollars to get Wellens to perform the service. However Kulekofsky and Wellens became

so interested in the pump that Kulekofsky negotiated a deal directly with Lovejoy and Ubben for 50,000 shares of Industries as payment. A financing agreement was entered into between Kule Resources, Kulekofsky's company, and Industries to disguise the true purpose of the transfer of Industries shares.

5. In the Midwest, Ubben and his two associates, Edward Currie and Larry Plew, touted the stock to potential investors. They formed "Tina Inc." and through it began selling restricted stock on a promise that investors would receive one free and tradeable stock for every three restricted they purchased. To make good on that promise, Dear Ubben attempted to convert his 166,000 Bell-Ko shares into free and tradeable Industries shares by using nominees as to ownership of the Bell-Ko shares and legal opinion letters to free up the shares. The government contended that Ubben forged the signature of Mert Reese, who served as Industries local counsel on the opinion letters. Suspension on trading in the stock by the S.E.C. on March 28, 1973, prevented the plan from succeeding (529-30, 599, 604, 612-13, 633-34, 684-86, 696). However, approximately \$500,000 was obtained in the form of investment and loans and the government contended that much of the money went to Ubben, Plew, and Currie rather than to Industries where it belonged.

6. After trading of Industries stock on the over-the-counter market began in February 28, 1973, Mahler and Zucker freed up through opinion letters and then dumped 40,000 Industries stock on the over-the-counter market, deriving profits of \$130,000 (125-32, 161-65, 329-31, 379). They also arranged to obtain an opinion letter freeing up 40,000 shares owned by Marvin Greenberg, a Bell-Ko insider (380). In a series of prearranged sales on the over-the-counter market, Mahler and Zucker, using their nominee Anted Vending, then bought the block at 50 cents and sold 35,000 to Ubben's nominee at \$1 and 5,000 to Kulokofsky at \$3.50. However, the sale to Ubben was made to appear at \$2 because the market was rising so rapidly. Mahler and Zucker then refunded the difference to Ubben with a disguised payment - a check from another nominee of Mahler and Zucker, Jefferson Retread Co., to Edward Currie, purportedly for the purchase of Hup stock (135, 139-40, 151, 167-68).

After the S.E.C. began its investigation, Mahler and Zucker attempted to conceal their involvement by having a new account form signed by Michael Sichel and substituted for the original Anted Vending Company form signed by Mahler (144). Eventually, Industries went bankrupt.

B. Dean Ubben's Case

Dean Ubben testified in his own defense and relied on government testimony and exhibits to confirm many of his assertions. Ubben had no formal education beyond high

school (1457). He worked as a plumber and then as a real estate broker (1458). He was 46 years old when he learned about the pump. He had no criminal record (1458).

Ubben claimed he intended to raise money for Industries honestly and legally and that he became involved because he had so much faith in the pump and its unlimited potential (1487-88). In this regard, he introduced documentation and charts to show how most of the \$519,396 he raised went directly into the company - \$328,000 - and that most of the balance went for expenses, leaving him with a net gain of approximately \$26,954 (1559-66, 1576-88). He not only relied on Lovejoy's representations as to the value of the pump (1488-90) but also the independent assessment of Hoover Ball Bearing which obtained exclusive marketing and distributing rights and prepared very optimistic sales projections (1502-03, 1513-14). He pointed also to testimony of Government witness Plew that he was still in the business of selling the pump and that the pump was a good product (675). Other aspects of Ubben's testimony were as follows:

All of the investors he solicited were made aware of the company's cash flow problems.

He did not bribe Wellens and Kulekofsky in order to get Wellens to go into the pink sheets. The "Kule" agreement reflected the true arrangement between Kulekofsky

and the company and was not a cover for a bribe (1510-15).

As a non lawyer he had no idea what facts belonged in the Bell-Ko proxy and what facts did not and that he relied on the lawyer, Harold Herman, and Mahler and Zucker to prepare a proper proxy (1478, 1482-84, 1504-05).

He was selling Industries stock through Tina in good faith reliance on two exemptions from the registration requirements of the Securities Act of 1933. When he sold restricted stock he believed the private placement exemption existed. When he also offered and promised investors free and tradeable stock he believed the Rule 133 exemption applied. With respect to the Rule 133 exemption, Ubben testified that he relied on the assurances of Harold Herman that all the rules would be and then had been complied with. Herman told him, furthermore, that his 164,000 Bell-Ko shares could be converted into Industries free and tradeable shares and then broken down through the use of nominees in order to get free and tradeable stock to the investors and that such a course of action would be legal.* Ubben also denied forging the signature of Mert Reese on the opinion letters (1540-42, 1545-49).

In respect to the 40,000 Industries shares originally owned by Marvin Greenberg, Ubben maintained that he

* Herman denied this (383-86).

took no part in and had no knowledge of the prearranged transactions (1551-59).

With respect to the government evidence that Bialek's balance sheet improperly capitalized \$200,000 as research and development and improperly pegged the value of land and building at its appraised value of \$39,200 rather than at cost of \$53,000, Ubben maintained that he relied on the C.P.A. Bialek that the figures could be used (1512-13) and that he did not control Bialek (1470-71). Lovejoy had assured him as well as Norblom that the company had indeed expended \$200,000 on research and development (1497). We note that Ivan Braverman, the government accounting expert, also testified that generally accepted accounting principles in 1972 permitted under proper circumstances capitalization of research and development (486).

C. Indictment; the First Trial, the Second Trial

The Government's first indictment named Mahler and Ubben, and Lovejoy, Bialek the Denver CPA, Greenberg the Bell-Ko insider, Rind, a P.J. Stanton principal, Hughes, Bachmann and Knight, who assisted Ubben in selling Industries stock and Dutzar, who brokered stock in the Greenberg transaction. Eight defendants went to trial in April and May 1977 before Judge Frankel. Bialek, Knight and Greenberg were acquitted before the mistrial during jury deliberations when a juror became ill.

The Government retried Mahler and Ubben before Judge Pollack in October, filing a superseding indictment about seven days before trial (A5). The Government presented several alleged conspirators, most of whom had pleaded guilty to various charges based on the Industries deal: Zucker himself (771); Kulekofsky, Wellens, Neddleman (a P.J. Stanton principal); Harold Herman, the attorney, and his brother Bernard who helped broker the sale of Mahler and Zucker stock through his separate firm. Other witnesses were Tiemers, the transfer agent, and Sichel, whose name had been used on Anted to conceal Zucker's and Mahler's interest in the sale to Ubben of the 40,000 Greenberg shares (994). Ubben's alleged Midwest activities were brought out through Norblum, Industrial's financial officer (500); Plew, to whom Ubben paid a 10% finder's fee for any investors he brought in (683), Mert Reese, Industries' Denver attorney, who denied signing certain opinion letters attributed to him (633-34); the nominees for Ubben's 166,000 shares (957, 962, 985), and investors who were promised freely tradeable shares but never received them (604, 613, 685, 696). The Government also had Ivan Braverman, a Denver accountant who had examined Industries' records after its stock was suspended (471) qualified him as an expert (470-71) and presented his opinion that there were improprieties in the Bialik statements and those were not accidental (480). On cross examination what effect Bialik's

acquittal might have had on that opinion, was precluded by the court (A97-98).

The rest of the Government's case was two twelve year convictions of Mahler, one for perjury before the SEC (742) and one for stock fraud (743), charged to the jury as "stock fraud cases bearing substantial similarity to the alleged conduct indicted in this case" (780)*, and an SEC investigator who analyzed the transactions in the case for the jury (1022).

Mahler and Ubben both testified on defendants' case. We have already summarized the thrust of Ubben's testimony. Mahler contended that when the Industries matter came up, he was in the process of withdrawing from his hectic schedule, was turning the business over to Zucker, and was ultimately betrayed by Zucker with respect to anything that went on (e.g. 1323-30, 1343-52). Testimony in support of that (1186-87) came from his attorney Charles Hecht, a former SEC staff attorney who also told about SEC requirements in the Rule 13 area, and who added that Mahler generally followed his instructions with care as to SEC requirements (1182-86) but Zucker, on the other hand, did not (1189-94); from Brodsky, who issued the Jefferson Retread check on Ubben's 40,000 share purchase from Mahler and Zucker (1264-65, 1267-71); and from

* The Government introduced the indictments, the convictions, and then Mahler's testimony in another case in which he testified about the underlying facts as a Government witness (666, 744-764).

Dutzar, a broker who purchased the 40,000 Greenberg shares for Mahler and Zucker (1236-90).

The jury rejected Mahler's and Ubben's contentions and convicted them on the thirteen counts charged after about four hours deliberation (1305-06). The district court then imposed the "longest jail sentences of their type in stock fraud cases," N.Y. Law Journal, December 9, 1977.*

* The Ubben sentence specifically was as follows:

Four years concurrently on counts 1, 4, 6, 7; on 2, 5, 9, 11; on 3, 8, 10, 12; and on 13, the conspiracy. However, the sentences on 1, 4, 6, 7, 2, 5, 9 and 11 were consecutive to 3, 8, 10, 12, 13 for an eight year total.

ARGUMENT

The Government's case against Ubben was strong but not conclusive. Its most damaging witnesses against him were co-conspirators whom the jury could as likely not credit; there were others involved (Zucker in particular) who could be expected to bear culpability for the challenged payoffs and price riggings rather than he, and the evidence of his belief in the pump, dealings with accountants and lawyers, and lack of sophistication to always murky SEC requirements (pp. 8-11 supra) raised serious issues with respect to his Midwest sales. Indeed on the first trial the jury acquitted at least two who, according to the proof at the second, were as guilty as he.

The jury's task was enhanced by the complexity of the case. The testimony spanned nine trial days in a record of almost 2,000 pages. There were hundreds of trial exhibits, including many financial documents. The indictment had thirteen counts, the Government having to prove as to each that the particular act occurred (A16), that the jurisdictional element was satisfied (A19), and that the securities law exemption urged in defense did not apply (A68-72).

It is significant, then, that faced with all this the jury deliberated only four hours (1805-06) that it asked for no testimony, no exhibits, and no further instructions and that it

returned guilty verdicts against both defendants on all thirteen counts (1806); suggesting we submit, not necessarily that the jury would have acquitted without the errors we raise but that those errors deprived Ubben of the careful and reasoned deliberations he deserved. We discuss them in separate points but our argument is on their cumulative impact.

POINT I

THE DISTRICT COURT ERRED IN
RETAINING THE ALTERNATE JURORS
AFTER THE REGULAR JURY BEGAN
DELIBERATION.

Rule 24(c) provides:

"An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

In other circuits failure to follow that direction might be enough in itself to compel reversal, United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964), United States v. Beasley, 464 F.2d 468 (10th Cir. 1972),* even if the parties consent to retaining the alternate. This Circuit looks not only to the error but to the resulting prejudice, United States v. Hayutin, 398 F.2d 944, 950-51 (2d Cir. 1968), but only after a full hearing below if such prejudice is not evident on the appeal. United States v. Nash, 414 F.2d 234 (2d Cir. 1969).** See also United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975).

At the least there must be such a hearing in this case.

* See United States v. Allison, 481 F.2d 468 (5th Cir. 1973). (Beasley and Virginia Erection Corp. establish per se rule).

** Since eventually this Court will probably have to face the prejudice issue on a full record, the best procedure is to remand on this appeal, United States v. Allison, supra, and 487 F.2d 339 (5th Cir. 1973) rather than compelling appellant to commence a Sec. 2255 proceeding.

The first trial ended in a mistrial when one of the deliberating jurors became ill. To avoid that in the second, the district court refused to discharge the four alternates, sending them to Room 100 to "be available there, should there arise any circumstance that I may wish to call on you for" (A94), to be "held in reserve for the moment" (A95). He instructed them not to discuss the case but other left them unsupervised (A94-95).

At this point we have no evidence one way or another whether the alternates complied with that request so that at a minimum there must be hearing on that issue. Compare United States v. Lamb, supra (release of alternate juror without supervision, even with instructions not to discuss case, disqualifies juror). We submit, however, that there may well be sufficient prejudice for reversal on this record. The district court instructions to retain the alternates were given in the regular jurors' presence (A96). These same regulars knew that there had been an earlier trial, that a juror had been ill on that trial, and that they were not to serve if there was any chance of their becoming sick. Knowing all this, we do not see how the district court's maintaining the alternates in reserve could not be taken as a suggestion

by some that the regular jurors move quickly, resulting in an accelerated and hence erroneous verdict.*

* We note in addition the district court's statement to the jury that it could call for re-reading of the transcript but that such requests should be made carefully because pinpointing transcript answers to the jury's questions was difficult (A93).

Defense counsel did not object to the district court's retaining the alternates. Failure to object, however, "to a procedure clearly infringing the unambiguous mandatory prohibition of Fed.R.Crim.P.24(c)", United States v. Lamb, supra at 1157, clearly does not waive the point. United States v. Lamb, supra.

POINT II

THE DISTRICT COURT IMPROPERLY CURTAILED
CROSS EXAMINATION OF THE GOVERNMENT'S
EXPERT, CONVEYED THAT AN IMPORTANT
DEFENSE WITNESS SHOULD NOT BE CREDITED,
AND IMPROPERLY CHARGED.

A. Braverman's Cross Examination.

In mid 1973, after trading in Industries stock had been suspended, Ivan Braverman, then associated with a Denver CPA firm, prepared for Industries a balance sheet covering the period September 30, 1972 through July 31, 1973. The Government urged (1635) that the statement proved the company was worthless over this period because it had a total operating loss for the period of about \$345,000 (477) and a deficit net worth of about \$150,000 (476).

Braverman also testified about Bialek's September 30, 1972 balance sheet. In his opinion Bialek's assets of \$482,000 should have been \$246,000, an equity of \$256,000 should have been \$20,000 and net income of \$76,000 should have been a loss of \$13,000 (479-80). He added that Bialek's mistakes "could not have been accidental" (480). The district court, however, refused to permit Ubben's counsel to utilize Bialek's acquittal in the prior trial in challenging that opinion on cross-examination (A97-98).

This was error. F.R.Evid. 611(b). Braverman's testimony on the purpose of Bialek's mistakes did not come

from special knowledge. It was an expert opinion only.* Given that, counsel was entitled to challenge the opinion by just about anything relevant to the subject matter United States v. Wainwright, 413 F.2d 796 (8th Cir. 1969); and nothing could have been more relevant than a specific finding in litigation to which the Government was a party that Bialek had not acted purposefully, Perkins v. United States, 315 F.2d 120 (9th Cir. 1963). We might see some justification for the restriction if the court, to protect defendants, precluded mention of the first trial for a purpose. It did not, however, saying the first trial could be mentioned, but not the acquittals (A93).

The unwarranted restriction severely prejudiced Ubben. On opening the Government stressed that a crucial element of the plan to defraud was the "phony financial statement" put together by Bialek for Ubben (11-12). See also Indictment, Par. 4. Braverman then cited as Bialek's two chief mistakes (490) valuing the real estate at an \$89,000 appraised rather than a \$53,000 cost (482) and capitalizing \$200,000 for developing the pump when there had been an accounting election the previous year, which had to be followed, to expense them (486). Norblum testified

* Braverman's view on Bialek was reflected in charts prepared specially for the trial (473). See also A 79: Braverman mentioned as expert in court's charge.

immediately after that Industries' accountants before Bialek were reluctant to handle the matters that way, that Ubben was upset at this because he wanted the company to reflect a greater net worth, and that Ubben then arranged for Bialek to do the statement (509-13). The issues, however, were close since Bialek's statements were unaudited (483) and footnoted the appraisal as the source for the real estate and several witnesses noted that Lovejoy claimed to have support for the figures (513). The district court's restrictions therefore made a difference in the picture portrayed to the jury, harmed Ubben because supposedly he was at the root of the whole thing, and require reversal.

B. Cross Examination of Hecht

Charles Hecht is a New York City attorney. He spent two and one half years with the SEC's Corporate Finance Division, lectured on mergers and acquisitions at the Graduate School level and published articles on the same subject (1170-71). He represented Mahler in 1972 on several shell mergers (1175) but not Industrials International.

Hecht's defense testimony had three purposes: to exculpate Mahler by showing a general modus operandi consistent with legality which Mahler but not Zucker observed (1181-93); to report on a Zucker statement in a private litigation with Mahler, that he would use the Industries trial "to get even" with Mahler (1196-97); and to demonstrate that there was a

genuine legal basis for the Industries Bell-Ko merger (SEC Rule 133) if that route were properly followed (1175-81). The court's charge on expert opinions noted this last aspect of his testimony (A79-80).

The district court, however, insured that all these purposes were defeated. Thus, when Hecht said that Mahler candidly revealed his prior SEC problems to him, the district court immediately implied that Hecht should not have represented Mahler because of a possible interest conflict arising from his Government service (1173).^{*} When Hecht explained that certain disclaimers in the prospectus of an earlier Mahler-Ubben merger (HUP) put shareholders on notice of the risk factor, the district court inquired at length for an answer that the disclaimers would not be adequate for a Rule 133 filing with the intention to immediately trade stock (1231). When the Assistant queried Mahler's conviction for payments to brokers the district court attempted to have Hecht characterize these as stock frauds although Hecht insisted he didn't know the circumstances (1198-99). And when the Assistant questioned Hecht on the extent of disclosure in the HUP prospectus the court criticized him for not answering the Assistant's questions, although his responses were proper and the Assistant was perfectly capable of clearing up any ambiguity if it existed (1208-09). See also 1215-16, 1221 (questioning in support of

^{*} Questioning brought out that Hecht had nothing personally to do with the Mahler cases while he was at the SEC, and that the matter in fact preceded his arrival there (1174-75).

Assistant's statement that stockholder derivative fee is contingent fee).

These actions, particularly the siding with the Assistant on the HUP prospectus,* although designed to expedite the proceedings and clarify the testimony as the district court saw it, inevitably carried the impression to the jury that Hecht was not to be credited, United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971). Although the district court was careful to point out later on (A18) that it held no views on the evidence, that was not enough.

C. Mahler's Prior Convictions and the Charge.

Mahler, we understand, will argue on his appeal that the district court should not have admitted his prior convictions on credibility and as similar acts, and improperly weighted its charge in the Government's favor. See his Second Circuit motion for bail pending appeal. We agree, and rest on his discussion. Both errors affect Ubben, the charge, of course, but in addition the prior convictions because they enabled the Government to argue that Mahler had knowledge of how to bring off a stock fraud and that Ubben's guilt was proven by his association with such a person.

* The Court drew from Hecht in the case of HUP that a valueless company should not be traded at a substantial price (1231), and that any prospectus which did not reflect this was misleading. This was exactly the point the Assistant was making about Industries. The difference of course was that Industries owned the rights to the pump and that the pump had real, possibly extraordinary value.

POINT III

UBBEN'S EIGHT YEAR SENTENCE WAS
DISPARATE AND EXCESSIVE

Before United States v. Ramos, ___F2d___ (2d Cir. 1978), Slip Op. 1575 (Feb. 15, 1978), we would have hesitated to make this point. That case, however, read together with United States v. Robin, 553 F.2d 3 (2d Cir. 1976), see also, United States v. Stein, 544 F.2d 96 (2d Cir. 1976), clearly signal, we believe, that this Court will consider the merits of lengthy sentences which are out of proportion to those commonly received in like cases, reversing when no justification for the disparity is shown. That is this case.

Ubben's sentence is plainly long (eight years) and plainly out of proportion to others similarly situated. United States v. Stein, *supra*. Defendants in stock fraud cases receive an average sentence of 21.5 months (Tr. Dec. 8, 1977, p. 3). The other five convicted defendants, by way of plea, received \$500 fines (two cases), three months, four months and three years. Outside of Industries and the two other deals before it (HUP and UGBI), Ubben had a clean record. He was well regarded in his home town of

Beatrice, Nebraska, earned a legitimate living, and did much for the community.* He expressed regret for what had taken place (Id., p. 32).

The issue therefore reduces to justification for the disparity. United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960); Rubin, From Disparity and Equality of Sentences - A Constitutional Challenge, 40 F.R.D. 55; Coburn, Disparity in Sentences and Appellate Review of Sentencing, 25 Rutgers L.Rev. 207, 208-212 (1971); Seymour, 1972 Sentencing Study for the Southern District of New York, 45 New York State Bar Journal, 163, 166-169 (1972). The

* Tr., Dec. 3, 1977, p. 30:

"MR. BLACKSTONE: Except for this prosecution, he has no prior criminal record whatsoever. He is a family man, a regular churchgoer. He has always been active in community affairs in that town of Beatrice where he comes from.

He served his country in World War 2 and in the post-war period, and he did so honorably. He has always worked hard for a living, as a plumber, as an auctioneer, and then as a real estate broker.

He never was a burden to his community; he didn't sponge off it. Indeed, he helped the community by bringing business to it and managing the Indian Creek Mall which is the town's only shopping center.

Dean Ubben enjoys an excellent reputation in the town of Beatrice. When the town's mayor, the president of the Chamber of Commerce, the town's police chief and some of the town's biggest businessmen come forward and speak favorably about him to you, in their letters, I am sure that you may rest assured that Dean Ubben does have that reputation for good reputation, and that has been earned."

district court thought that Ubben had perjured himself at the trial (p. 32), a troublesome finding. That, however, cannot account for, let alone justify, the total lack of proportion with others in like circumstances. The sentences, therefore, should be vacated. In view of the district court's avowed dislike of defendant (p. 32), re-sentencing should be before a different judge. United States v. Ramos, supra.

CONCLUSION

Ivan Braverman was an important expert witness for the Government. The district court improperly precluded a line of cross-examination which would have made his testimony less persuasive. Charles Hecht was an important expert witness for the defense and gave testimony which damaged that of Zucker, the principal co-conspirator, as well. The district court improperly conveyed to the jury its own impression that his views were not persuasive. Its charge and its admission of Mahler's prior convictions were further weights in the Government's favor so that when the jury came to deliberate complex issues and a multitude of evidence, the court's admonition that it was holding the alternates in reserve, clearly improper under F.R.Crim.P. 24, could be taken by some jurors as a suggestion that deliberations move quickly,

especially when coupled with a statement that finding transcript references was difficult.

Because of these errors, there should be a reversal for a new trial. Barring that, there should be a remand for a hearing to explore the consequences of the Rule 24 violation. Alternatively, the defendant-appellant Dean Ubben should be resentenced before another judge.*

Respectfully submitted,

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* We also rely on the points of co-appellant to the extent applicable.